Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	**)**	**CG Docket No. 02-278**
	)	
The Petitions for a Declaratory	**)**	
	)	
Ruling of The Consumers Bankers	**)**	
	)	
Association and Other Similarly	**)**	
	)	
Situated State Telemarketing Law	**)**	
	)	
Preemption Petitions	**)**	

COMMENTS OF JOE SHIELDS IN REGARDS TO THE PETITIONS FOR A DECLARATORY RULING OF THE CONSUMER BANKERS ASSOCIATION AND OTHER SIMILARLY SITUATED STATE TELEMARKETING LAW PREEMPTION PETITIONS BEFORE THE COMMISSION

I respectfully submit this comment to the Commission in reply to the Consumer Bankers Association Petitions for a Declaratory Ruling on Preemption of Indiana and Wisconsin Telemarketing Law as they relate to interstate telephone calls as well as other similarly situated state telemarketing law preemption petitions that the telemarketing industry has filed or is preparing to file with the Commission.

In the June 26th, 2003 Commission Report and Order the Commission came to the following conclusion:

> "Although section 227(e) gives states authority to impose more restrictive intrastate regulations, we believe that it was the clear intent of Congress generally to promote a uniform regulatory scheme under which telemarketers would not be subject to multiple, conflicting regulations. We conclude that inconsistent interstate rules frustrate the federal objective of creating uniform national rules, to avoid burdensome compliance costs for telemarketers and potential consumer confusion. The record in this proceeding supports the finding that application of inconsistent rules for those that telemarket on a nationwide or multi-state basis creates a substantial compliance burden for those entities."

The Commission conclusion is flawed. The state preemption savings clause in the TCPA is explicit in permitting states to supplement the TCPA with more restrictive intrastate requirements **or** flat out prohibit any type of telephone solicitation. Congress used the "or" to define **two** conditions where states can impose more restrictive laws.

The TCPA's savings clause, under the second condition, reads in pertinent part:

> Except for the standards prescribed under subsection (d) [technical standards] of this section and subject to paragraph (2) of this subsection, nothing in this section or in the regulations prescribed under this section shall preempt any State law… which prohibits–
>
> > (A) the use of telephone facsimile machines or other electronic devices to send unsolicited advertisements;
> > (B) the use of automatic telephone dialing systems;
> > (C) the use of artificial or prerecorded voice messages; or
> > (D) the making of telephone solicitations.

Therefore Congress specifically granted the states the right to enact a total and absolute restriction, without exemption; on any or all types of telemarketing solicitations - a much more restrictive law then the TCPA.

This type of savings of more restrictive state statutes is common. See e.g. 28 U.S.C. § 2009 (employer polygraphs); 42 U.S.C. § 11115 (physician reviews); 20 U.S.C. § 6084 (education standards). In such instances, states are allowed to set more restrictive **state** standards

With the TCPA, Congress supplemented state law, by allowing state statutes that are more restrictive than the TCPA to withstand preemption. This creates a "floor" of protection allowing states to provide greater protections:

> The express purpose of such [savings] provisions, therefore, is to maximize the options available to plaintiffs by ensuring that federal statutes provide a "floor" for a plaintiff's rights and remedies while guaranteeing that such statutes never serve as a "ceiling" limiting the potentially greater scope of rights and remedies available under state law.

Wood v. County of Alameda, 875 F.Supp. 659, 663 (N.D. Ca. 1995).

The courts have consistently held that this type of savings "permits states to supplement the federal law's remedial scheme.

The argument made by those seeking preemption of more restrictive state telemarketing laws has been rejected by courts **construing nearly identical savings language**. In Mennen v. Easter Stores, 951 F. Supp. 838 (N.D. Iowa 1997), the plaintiff sued his former employer for violations of the Employee Polygraph Protection Act ("EPPA") (29 U.S.C. § 2001 et seq.) and for violations of a similar state statute (Iowa Code § 730.4).

> "While it is clear that Congress could have preempted state polygraph statutes with its enactment of EPPA, it expressly declined to preempt state polygraph statutes which are more restrictive than federal law."

Mennen, 951 F. Supp. at 848 n. 14.

The aforementioned statute, the EPPA, provides that "(e)xcept as provided in subsections (a), (b), and (c) of section 2006 of this title, this chapter shall not preempt any provision of any state or local law...that… is more restrictive with respect to lie detector tests than any provision of this chapter." 29 U.S.C. § 2009.

Note that this savings language is nearly identical to the savings language in the TCPA. Compare 47 U.S.C. § 227(e).

The TCPA adds to state laws by giving consumers and state attorneys general a federal cause of action against telemarketers, in addition to their state cause of action.

> "Such a federal law tends only to supplement state law by providing another vehicle by which to carry forth the substantive policies which both the federal and state laws will further."

Dornberger v. Metropolitan Life Ins. Co., 961 F.Supp. 506, 520 (S.D.N.Y.1997).

Consequently, I respectfully urge the Commission to issue a correct interpretation of the state preemption savings clause in the TCPA and forthwith dismiss all petitions requesting state telemarketing law preemption.

Respectfully submitted,

/s/

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